Filed 12/19/16 P. v. Griffin CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. QUANTIS DEMON GRIFFIN, Defendant and Appellant.	C074779 (Super. Ct. No. 6212720)

Defendant Quantis Demon Griffin -- having previously been sentenced for possession of a firearm by a felon and false impersonation subjecting the other person to prosecution or penalty -- appeals from the trial court's order finding him ineligible for resentencing under Penal Code section 1170.126, on the ground he was armed with a firearm in committing the offense(s). (Unless otherwise stated, statutory references that follow are to the Penal Code.) Defendant contends the trial court erred because his third-

strike sentence was not "imposed" for being "armed"; there was no pleading or proof that he was armed; and the factual record does not show he was armed. We reject the contentions and affirm the order.

FACTS AND PROCEEDINGS

On September 18, 2000, as part of a negotiated plea agreement disposing of an information that charged four counts, defendant pleaded guilty to possession of a firearm by a felon ([former] § 12021, subd. (a)(1), now § 29800, Stats. 2010, ch. 711, §§ 4, 6), personating another so as to make that person liable (§ 529, former subd. (3), now subd. (a)(3) [false personation while doing any act where the person falsely personated might become liable to suit or prosecution or penalty, or the person doing the personating or a third party might benefit]), and perjury in applying for a driver's license (§ 118, subd. (a)). He also admitted five prior strikes under the three-strikes law. The plea agreement specified a sentencing lid of 34 years to life in prison, which included a nine-year determinate term from a different case.

In January 2001, the trial court denied defendant's request to strike priors (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) and sentenced defendant to two concurrent terms of 25 years to life for the possession and personation offenses, consecutive to the nine-year determinate term. The court dismissed the perjury count in the interests of justice (§ 1385).

After the November 2012 election approving Proposition 36, defendant in March 2013 filed a petition for resentencing under section 1170.126, subdivision (e).

The prosecution opposed the petition on alternative grounds that (1) defendant was statutorily ineligible for sentencing because he was armed with a firearm during commission of the possession charge and the personating Darrell Sloan charge, and (2) defendant poses an unreasonable risk to public safety if released.

Defendant filed a response, arguing the record of conviction established only that it was his gun that was in the woman's purse; there was no evidence that he knew the gun was in the purse.

The factual basis for the plea, as stated by the prosecutor at the hearing in the trial court, was as follows:

"[O]n December 31st, 1999, the defendant was asked during a vehicle stop by Officer Frank Ortiz in the city of Roseville, Placer County, California, if [defendant] was one of five individuals, including a driver, who were in that vehicle. Officer Ortiz perceived the odor of alcohol in the car and at least four of the individuals appeared to be under age so he asked them to step out of the car.

"Captain Chuck Knuthson also arrived on the scene to assist. Captain Knuthson removed a woman's purse from the back seat near the floorboard area where the defendant had been sitting on the passenger -- I'm sorry, on the driver's side of the vehicle. Captain Knuthson handed that purse to Officer Ortiz [who], feeling its excessively heavy weight, removed a loaded .25 caliber firearm. [¶] The purse belonged to an individual . . . who denied ownership of the gun, but since the gun was in her purse, she was the one arrested. A few days later Roseville PD received the information that [sic] the individuals in the car, the defendant in this case who had falsely identified himself at the scene as Darrell Sloan, was not, in fact, Darrell Sloan but was, in fact, Quantis Griffin, the defendant we have here in court. The gun found in the purse was not, in fact, [the female's] but was, in fact, Quantis Griffin's.

"From there the investigation continued. The other individuals in the car were interviewed. They all verified those statements. Videotaped statements were taken from [the female], the defendant, and some of the other involved individuals, including Darrell Sloan, the person personated. They all verified it was, in fact, the defendant in the car and that was, in fact, his gun.

"With respect to Count Four [perjury], the defendant was arrested on March 2nd, the year 2000, while at his place of employment, a Safeway Store. He had in his possession a California driver's license in the name of Julius Lee Thompson. Since the individual who arrested the defendant knew that he was, in fact, Quantis Griffin, not Julius Lee Thompson, investigation revealed that this particular defendant had obtained two different driver's licenses, one in his own name and one in the name of Julius Lee Thompson as verified by the same thumb print on both applications."

With respect to the prior felony convictions, defendant was convicted in March 1998 on five counts of violating section 245, subdivision (a)(2), with a section 12022, subdivision (a), armed with firearm allegation attached to each count, and also five counts of robbery (§ 211). The 10 counts all arose out of the same incident.

The prosecutor stated, "I would stipulate that that, in conjunction with the 190 pages of discovery and the approximately five videotaped tapes that we have provided and the defendant's criminal history from both this case and the robbery case, constitutes the factual basis."

The trial court asked, "Defense counsel accept the factual basis as stated?" Defendant himself said, "Yes," and defense counsel also said, "Yes."

Thus, although the prosecutor did not repeat verbally his assertion in the written opposition that the purse's owner said defendant put the gun in her purse that night, defendant expressly accepted the factual basis that included the exhibits. The parties stipulated that the exhibits be returned to the prosecution. No one has made them part of the record on appeal.

The trial court issued a written ruling finding defendant statutorily ineligible for resentencing. The court said it "reviewed factual information contained within the court record, specifically, the transcript of the plea and the preliminary hearing transcript. Based upon the Court's review, [defendant] was a backseat passenger during a vehicle stop. On the backseat floorboard near where the defendant had been sitting was a purse

containing a handgun. [¶] [Defendant] argues the record is insufficient to establish that he was aware that the weapon was near him. The Court disagrees. The Court finds that during the commission of the present offense [defendant] was 'armed with a firearm,' as defined in *People v. Bland* [(1995)] 10 Cal.4th 991, 997 [*Bland*]. The firearm was near to where the defendant was seated in the vehicle and available for use either offensively or defensively. Further, during his plea, the defendant admitted possession of the firearm, an element of the offense." The trial court noted defendant did not admit, nor was any sentence imposed for, an arming enhancement (§ 12022, subd. (a)(1)). The court viewed section 1170.126 as "arguably unclear" but found "the clear intent of the voters was to prohibit resentencing for felonies committed when the defendant was armed with a handgun, regardless of whether an arming enhancement was admitted or a sentence imposed for that particular enhancement. . . . The Court finds that because [defendant] was armed with a firearm during the commission of his present offense, he is ineligible for resentencing."

DISCUSSION

This appeal presents questions of statutory interpretation, which we review de novo. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.)

I

Sentence Imposed for Being Armed During Commission of Offense

Defendant argues that, because his three-strikes sentence was not "imposed" for being armed "in the commission" of the offense, he was not statutorily ineligible. He acknowledges his position is undermined by *People v. (Mark Anthony) White* (2014) 223 Cal.App.4th 512 (*White*) but argues *White* was wrongly decided and in any event is distinguishable. However, arguments similar to those made by defendant have been repeatedly rejected by this and other courts while this appeal was pending.

Section 1170.126, subdivision (e), provides: "An inmate is eligible for resentencing if: [¶] . . . [¶] (2) The inmate's current sentence *was not imposed for any of the offenses* appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (Italics added.)

The referenced three-strikes sentencing statute, section 667, provides in subdivision (e)(2)(C)(iii): "If a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the defendant shall be sentenced pursuant to paragraph (1) of subdivision (e) [twice the term rather than three times the term] unless the prosecution pleads and proves any of the following: [¶] . . . [¶] (iii) *During the commission of the current offense, the defendant* used a firearm, *was armed with a firearm* or deadly weapon, or intended to cause great bodily injury to another person." (Italics added.) The same provision appears in section 1170.12, subd. (c)(2)(C)(iii).

A person may be convicted of the offense of felon in possession of a firearm without being in actual possession of the gun, e.g., by buying a gun without having it in his control. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417; *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) Thus, a conviction for possession of a gun by a felon is not necessarily an offense ineligible for resentencing, because it does not necessarily mean the defendant was "armed" with the gun. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1313-1314 (*Elder*).)

Being "armed with a firearm" *for purposes of an enhancement* under section 12022 means the defendant has a gun available for use "in the commission" of the felony, which calls for a facilitative nexus between having the gun and committing the underlying felony. (§ 12022; *Bland, supra,* 10 Cal.4th at pp. 999, 1002; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1032 (*Osuna*).) In contrast, the wording of the "armed"

disqualification incorporated into section 1170.126 is different; it applies to offenders who were armed with a firearm "during the commission" of their offense, which states a different rule which would not exclude possessory offenses. Since the issue is not additional punishment but rather eligibility for reduced punishment, the literal language of Proposition 36 disqualifies an inmate from resentencing if there was a temporal nexus, in that he was armed during the unlawful possession. (*Osuna, supra*, 225 Cal.App.4th at p. 1032.) Despite section 1170.126's literal language "imposed for any of the offenses," ineligibility is not limited to when a defendant is sentenced for being armed. Such a construction would contravene the electorate's clearly expressed intent both to prevent the early release of dangerous criminals and to relieve prison overcrowding by allowing low-risk, nonviolent inmates to receive shorter sentences. (*People v. Guilford* (2014) 228 Cal.App.4th 651, 656 (*Guilford*) [Third District]; *Elder, supra*, 227 Cal.App.4th 1308.) Other appellate courts have reached the same conclusion. (E.g., *People v. (Todd Eugene) White* (2016) 243 Cal.App.4th 1354, 1357 [Fourth District]; *People v. Blakely* (2014) 225 Cal.App.4th 1042 (*Blakely*) [Fifth Appellate District]; *Osuna, supra*, 225 Cal.App.4th 1020, 1030-1034 [Fifth Appellate District]; *White, supra*, 223 Cal.App.4th 512 [Fourth Appellate District, Division One].) The rule of lenity, invoked by defendant, does not assist him. (*Osuna, supra*, 225 Cal.App.4th at p. 1035 [rule of lenity does apply if interpretation would provide absurd result or a result inconsistent with apparent legislative intent].)

We conclude section 1170.126 disqualifies from resentencing an individual armed with a gun during commission of the crime of firearm possession by a felon, even absent an enhancement or sentence for being armed.

II

Pleading/Proof

Defendant argues he cannot be disqualified from section 1170.126 for being armed in the commission of the offense without "pleading and proof" of such arming under section 1170.12, subdivision (c)(2)(C), which provides: "For purposes of this section [aggregate/consecutive terms for multiple convictions, prior serious or violent convictions or felonies, and enhancements], and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has one or more prior serious and/or violent felony convictions: [¶] . . . [(2)(C)] If a defendant has two or more prior serious and/or violent felony convictions [as defined] that have been pled and proved, and the current offense is not a felony described in paragraph (1) of subdivision (b) of this section, the defendant shall be sentenced pursuant to paragraph (1) of subdivision (c) of this section, unless the prosecution pleads and proves any of the following: [¶] . . . [¶] (iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person. . . ." (§ 1170.12, subd. (c)(2)(C).)

The parties discuss *People v. Superior Court (Kaulik)* (2013) 215 Cal.App.4th 1279, which held Proposition 36 does not require pleading and proof of dangerousness as a basis to deny resentencing to a prisoner who is otherwise statutorily eligible. *Kaulik, supra*, at page 1304, cited *Dillon v. United States* (2010) 560 U.S. 817 [177 L.Ed.2d 271], which held the Sixth Amendment right to have a jury find essential facts did not apply to limits on downward sentence modifications due to intervening laws.

Defendant argues *Kaulick* is distinguishable because it did not involve a plea bargain, and the court here cannot rewrite the plea bargain to alter defendant's legal status or the legal consequences of his plea bargain, in which he bargained for a disposition that did not include any sentence imposed for being armed in the commission

of the offense. However, as we have explained, denial of resentencing under section 1170.126 did not depend on imposition of a sentence for being armed in the commission of an offense.

Defendant argues *Kaulick* and *Dillon* are distinguishable because they involved the exercise of discretion, whereas here the issue is statutory eligibility. However, while this appeal was pending, we issued opinions applying *Kaulick*'s reasoning to conclude there is no requirement for pleading and proof of circumstances (such as being armed with a gun) to render a commitment offense ineligible for section 1170.126 resentencing. (*Guilford, supra*, 228 Cal.App.4th at pp. 655-659; *Elder, supra,* 227 Cal.App.4th 1308.) Other appellate districts have reached the same conclusion. (E.g., *Blakely, supra*, 225 Cal.App.4th 1042 [Fifth Appellate District]; *Osuna, supra,* 225 Cal.App.4th 1020 [Fifth Appellate District]; *White, supra,* 223 Cal.App.4th 512 [Fourth Appellate District, Division One].)

Proposition 36 addressed both prospective sentencing and retrospective resentencing. This case involves the retrospective prong. For the prospective prong, a third qualifying felony conviction is prospectively subject to three-strikes sentencing only where a prosecutor "pleads and proves" that the prior convictions were for serious or violent felonies, and that a commitment offense is either a serious or violent felony, or otherwise comes within one of four qualifying classes of offenses. (§ 667, subd. (e)(2)(c), as amended by Proposition 36.) On the other hand, the retrospective relief under section 1170.126 is conditioned upon an eligible commitment offense, which "the trial court shall determine" on "receiving a petition for recall of sentence under this section." (§ 1170.126, subd. (f).) We said in *Elder*: "In rejecting an interpretation that a defendant becomes presumptively entitled to resentencing absent proof of dangerousness beyond a reasonable doubt, [*Kaulik*] notes it is determinative that the drafters omitted any requirement for the pleading and proof of dangerousness in the latter statute." (*Elder, supra*, 227 Cal.App.4th at p. 1314.) Thus, section 1170.126 does not of itself support

defendant's claim that his ineligibility was subject to pleading and proof in the proceedings underlying the commitment offense of his being armed. (*Id*. at pp. 1314-1315.)

As we said in *Guilford*: "Because the electorate required pleading and proof of these disqualifying facts in the prospective part of the Act, but not the retrospective part, we presume the intention was to dispense with a pleading and proof requirement in the latter case." (*Guilford, supra*, 228 Cal.App.4th at p. 657.) That the resentencing portion of the Act cross-references the prospective portions does not yield a conclusion that the electorate meant to imply a pleading and proof requirement for resentencing. In most cases such factors would not have been adjudicated in the current case, resulting in undermining one purpose of Proposition 36 -- to preclude dangerous persons from the recall provision. (*Id*. at p. 658.) We agreed with the Fourth District's opinion in *White, supra*, 223 Cal.App.4th 512, which held it was appropriate in considering a recall petition for the trial court to consider the facts of the crime, as shown by the record, to find the defendant ineligible. (*Guilford, supra*, 228 Cal.App.4th at p. 659.)

There is no right to a jury trial in a petition for resentencing under section 1170.126. (*Guilford, supra*, 228 Cal.App.4th at pp. 662-663; *Blakely, supra*, 225 Cal.App.4th at pp. 1057-1063.)

Defendant cites *Descamps v. United States* (2013) _ U.S. _ [186 L.Ed.2d 438], for the proposition that judicial fact-finding of elements never pleaded or proven is prohibited. We disagree. *Descamps* held that a trial court's fact-finding -- to determine whether a California burglary qualified for a sentencing enhancement under a federal statute adding an element that entry was "unlawful or unprivileged" -- violated the Sixth Amendment right to jury trial under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435]. However, *Apprendi* is inapplicable to an ameliorative provision such as 1170.126 which only decreases a defendant's sentence. (*People v. Johnson* (2016)

244 Cal.App.4th 384, 390, fn. 6; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1141, fn. 3; *Blakely, supra*, 225 Cal.App.4th 1042; *Kaulik, supra*, 215 Cal.App.4th 1279.)

Defendant argues that, because the pleading/proof requirement was not satisfied, the trial court's ruling deprived him of his constitutional right to due process. This contention fails because there was no pleading/proof requirement and, as we have held, an inmate has no due process right to a hearing on the threshold question of statutory eligibility for section 1170.126 resentencing. (*People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7-8.)

III

Factual Record

Defendant argues the factual record does not show he was armed during commission of the possession offense. However, he does not discuss the record but merely claims in one short paragraph that, because a person can be convicted of a possession offense without necessarily being "armed," he was not armed "as a matter of law." Defendant has not included the entire factual record in the record on appeal. He expressly agreed in the trial court that the factual basis for the plea included "190 pages of discovery and the approximately five videotaped tapes that we [the prosecution] have provided and the defendant's criminal history from both this case and the robbery case, constitutes the factual basis." Defendant has not asked for these exhibits to be transmitted for the appeal. (Cal. Rules of Court, rules 8.224, 8.320.) The appellant has the burden of providing an adequate record for review. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) Additionally, "an inmate . . . may be found to have been 'armed with a firearm' in the commission of his or her current offense, so as to be disqualified from resentencing under [Proposition 36], even if he or she did not carry the firearm on his or her person." (*People v. Superior Court (Martinez*) (2014) 225 Cal.App.4th 979, 984-985, 990, 992 [defendant convicted of drug offense was

ineligible for resentencing where law enforcement officers conducting parole search found defendant and drugs in kitchen and found guns in the house].)

In any event, the factual basis verbally stated in court suffices. By agreeing to that factual basis, defendant admitted he was in the car; it was his gun; his gun was in the car near his feet concealed in a woman's purse; everyone else in the car knew he and his gun were in the car; and he lied to police about his identity. That is more than enough to establish defendant was armed.

Defendant also argues the factual record does not show he was armed during the false personation offense under section 529. The People's position is that it does not matter, because he was armed during the possession offense. However, while this appeal was pending, the California Supreme Court issued an opinion holding that a defendant's ineligibility for section 1170.126 resentencing as to some counts does not necessarily preclude resentencing for other counts. (*People v. Johnson* (2015) 61 Cal.4th 674.) We therefore consider the matter.

The trial court in denying the section 1170.126 petition referred to "offense" in the singular and apparently treated both counts as one.

To be a felony, false personation under section 529 requires two acts by the defendant: (1) that he misidentify himself, and (2) that he "[d]oes any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person . . . ." (§ 529.)

Defendant argues the record does not show whether he had access to the gun when he misidentified himself to police, apparently after police had everyone get out of the car. He says the record of conviction does not reveal if police seized the gun before asking defendant his name, in which case he had no access, and even if the gun was still in the car when he gave the false name, he did not have access if he was outside the car.

However, defendant fails to acknowledge that the record of conviction includes 190 pages of discovery and several videotapes, as stipulated by defendant and considered by the trial court -- none of which defendant has presented as part of the record on appeal. As indicated, defendant has the burden on appeal to present an adequate record for review. (*Sanghera, supra*, 139 Cal.App.4th at p. 1573.)

Moreover, the sequence of events suggested by the record was that the officer who stopped the car asked the occupants to step out of the car; an officer who arrived to assist the first officer found the gun. This record does not support defendant's supposition that the police may have seized the gun before asking his name.

Defendant's standing outside the car with the gun inside the car would not preclude a finding he was armed. *People v. Superior Court (Martinez), supra*, 225 Cal.App.4th at pp. 984-985, 990-992, held a trial court erred in concluding "armed" for section 1170.126 purposes meant actual possession rather than constructive possession of the gun. There, the defendant was convicted of possession of guns, possession of heroin, possession of a controlled substance while armed with a loaded gun, and possession of a firearm by a felon. *Martinez* held the defendant was armed and therefore ineligible for resentencing, where a parole agent and sheriff's deputy performed a parole search at the defendant's residence, found him in the kitchen, found a gun either in the same room or a bedroom (there was conflicting evidence), and found two other guns in a closet of the residence. (*Ibid.*) Similarly, *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, held a defendant, convicted of drug possession for sale while personally armed with a firearm (*id.* at p. 1012, fn. 6), was "armed" and therefore ineligible for resentencing, where police officers entered the defendant's home, found him standing inside the doorway, found drugs in the kitchen, and found a loaded gun (about eight feet from the drugs) in an adjacent bedroom in a purse belonging to the defendant's wife. (*Id.* at pp. 1011, 1012.)

Defendant cites two cases, neither of which involved recall of sentence, both of which are distinguishable on their facts. *People v. Jackson* (1995) 32 Cal.App.4th 411, said a gun in a car "two blocks away from where the [sex] crimes occurred" was not readily accessible to the defendant, nor was the gun accessible when the defendant committed other sex offenses inside a motel room while the gun was stored under the seat in the car parked some undetermined distance away. (*Id*. at p. 421.) *People v. Balbuena* (1992) 11 Cal.App.4th 1136, held the defendant was not armed in furtherance of drug possession for sale, where police executing a search warrant forced entry after waiting as much as a full minute after knock-notice, found the defendant lying on the living room floor, found drugs and an *unloaded* gun concealed among clothing in a latched suitcase 10 to 12 feet away from the defendant, and no ammunition was found in the home. (*Id*. at p. 1138.) "No additional danger was created by the presence of an unloaded gun in a closed suitcase across the room from defendant." (*Id*. at p. 1140.) *Bland, supra*, 10 Cal.4th at p. 1001, fn. 4, disapproved *Balbuena*'s failure to consider drug possession as a continuous crime.

Here, the gun was loaded and accessible in a purse in a car with the occupants standing outside the car due to the officer having smelled alcohol. The record on appeal does not demonstrate trial court error in denying resentencing.

We therefore need not address defendant's argument that there is no evidence of the other element of section 529 -- an "other act" benefitting him or subjecting another person to liability -- hence no evidence he had access to the gun during any such "other act," and while he may be "stuck with his plea," that "sorry situation" cannot be compounded by finding he was armed in the commission of an offense he did not actually commit. We simply note defendant's guilty plea constituted an admission of every element of section 529 and is conclusive admission of guilt (*People v. Turner* (1985) 171 Cal.App.3d 116, 125), and defendant, having failed to present the full record for appeal, cannot prevail on a claim that he was not armed during an "other act."

We conclude the trial court properly denied defendant's section 1170.126 petition.

DISPOSITION

The September 3, 2013, order denying the section 1170.126 petition is affirmed.

HULL, J.

We concur:

NICHOLSON, Acting P. J.

MURRAY, J.